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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 31 and 52

**[FAC 2005-65; FAR Case 2011-011; Item IV; Docket 2011-0011,
Sequence 1]**

RIN 9000-AM13

Federal Acquisition Regulation; Unallowability of Costs

Associated with Foreign Contractor Excise Tax

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement certain requirements of section 301 of the James Zadroga 9/11 Health and Compensation Act of 2010, which imposes a 2 percent excise tax on certain Federal procurement payments to foreign persons. The rule disallows the cost associated with the 2 percent excise tax on certain foreign procurements.

DATES: Effective Date: [INSERT DATE 30 DAYS AFTER

PUBLICATION IN THE FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Mr. Edward N. Chambers, Procurement Analyst, at 202-501-3221, for clarification of content. For information pertaining to status or

publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-65, FAR Case 2011-011.

SUPPLEMENTARY INFORMATION:

I. Background

The James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111-347) was signed into law and effective on January 2, 2011. Section 301 of the Act amends the Internal Revenue Code of 1986 by adding a new section 5000C, Imposition of tax on certain foreign procurements (26 U.S.C. 5000C). Section 5000C imposes a 2 percent excise tax on payments made to foreign persons pursuant to Government contracts for the provision of goods or services, if the goods are manufactured or produced in, or the services are performed in, a country that is not a party to an international procurement agreement with the United States. The statute applies to contracts entered into on or after January 2, 2011. The statute does not apply, however, if the imposition of the tax would be inconsistent with any international agreement. The tax is to be collected in a manner similar to other U.S. taxes withheld on payments to foreign persons. Additionally, section 301 stipulates that no funds are to be disbursed to any foreign contractor in order to reimburse the tax imposed (26 U.S.C. 5000C Note).

On February 22, 2012, DoD, GSA, and NASA published a proposed rule in the Federal Register at 77 FR 10461

implementing the prohibition against reimbursement of the 2 percent excise tax, by revising the FAR rules so that the cost of the tax cannot be included as part of a payment, or as part of a cost-based negotiated price.

Regulations under section 5000C will be forthcoming from the Department of the Treasury that will provide specific guidance regarding the application of the tax and the procedures for withholding the tax. Once the Department of the Treasury implements procedures for withholding this 2 percent excise tax, the impact on applicable FAR provisions will be handled in a separate FAR case.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of significant changes

To comply with the statute, FAR 31.205-41 is amended to inform the Government and contractors that the costs of the 2 percent excise tax are not allowable. FAR 52.229-3, 52.229-4, 52.229-6, and 52.229-7 are amended to provide that the costs for the 2 percent excise tax are not included in either foreign fixed-price contracts with a foreign concern or foreign fixed-price contracts with foreign governments.

Based on a review of the public comments, discussed below, the Councils have concluded that no change to the proposed rule is necessary.

B. Analysis of public comments

The Regulatory Secretariat received responses from two respondents to the proposed rule which are discussed below:

1. Intent of the rule.

Comment: One respondent believes the intent of this rule is to encourage countries to sign the World Trade Organization (WTO) Government Procurement Agreement (GPA) and other Free Trade Agreements (FTAs) identified under FAR part 25.

Response: The intent of the FAR rule is to implement requirements in the FAR to disallow the cost of the 2 percent excise tax mandated by the Public Law 111-347. The FAR is the primary document for uniform policies and procedures for acquisition by all executive agencies. FAR part 25 provides policies and procedures applicable to acquisitions that are covered by the trade agreements to which the United States is a party.

2. Implementation of the 2 percent excise tax and withholding procedures.

Comment: Both respondents submitted comments regarding the implementation of the 2 percent excise tax and

the Government's intended withholding procedures. These comments included:

a) Turkey is a member of the WTO, but is only an observer of the WTO's GPA. Will the 2 percent excise tax be applied to Turkish contractors?

b) The rule is considered to be a violation of the trade and investment agreements between Turkey and the U.S.

c) The rule will impose a tax that will cause certain foreign contractors to withdraw from contracting with the U.S. Government.

d) The rule should apply to future contracts, not be retroactively applied to already signed contracts.

e) The rule degrades the U.S. Government's ability to procure qualified contractors to perform in areas of the world, such as Afghanistan.

f) The rule creates unfair treatment to non-signatories of the WTO GPA and favors WTO GPA signatories and U.S. contractors.

g) The rule fails to define "international procurement agreement" and the respondent believes that it refers only to the WTO GPA and other Free Trade Agreements, as identified in FAR part 25.

h) The respondent believes that contractors from WTO GPA signatory countries will still be subject to the

rule in the event that goods are produced or services rendered in a non-signatory country.

i) Will the 2 percent excise tax be withheld from payments to subcontractors?

Response: The intent of the rule is to implement the requirements of Public Law 111-347 in the FAR regarding the disallowance of the cost of the 2 percent excise tax. This rule does not determine the extent to which contract payments will be subject to the tax. Regulations under section 5000C will be forthcoming from the Department of the Treasury, which will provide guidance regarding the application of the tax and the procedures for withholding the tax. This rule simply disallows the tax as part of a payment, or as part of a cost-based negotiated price.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Information and Regulatory Affairs (OIRA) has deemed that this is a

significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993, and that this rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. because the 2 percent excise tax is applied only to foreign persons that receive payments made pursuant to a contract with the Government of the United States for the provision of goods, if such goods are manufactured or produced in any country which is not a party to an international procurement agreement with the United States, or the provision of services, if such services are provided in any country which is not a party to an international procurement agreement with the United States. "Foreign person" means any person (including any individual, partnership, corporation, or other form of association) other than a United States person. Therefore, this rule is expected to have no impact on domestic small business concerns. There are no reporting, recordkeeping, or other compliance requirements for this rule. The approach described in this rule is the most practical and beneficial for both Government and industry.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 31 and 52

Government procurement.

Dated: January 23, 2013

Laura Auletta,
Director,
Office of Governmentwide
Acquisition Policy,
Office of Acquisition Policy,
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 31 and 52 as set forth below:

1. The authority citation for 48 CFR parts 31 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

2. Amend section 31.205-41 by adding paragraph (b) (8) to read as follows:

31.205-41 Taxes.

* * * * *

(b) * * *

(8) Any tax imposed under 26 U.S.C. 5000C.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Amend section 52.229-3 by revising the date of the clause and paragraph (b) to read as follows:

52.229-3 Federal, State, and Local Taxes.

* * * * *

FEDERAL, STATE, AND LOCAL TAXES ([INSERT ABBREVIATED MONTH AND YEAR
30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER])

* * * * *

(b) (1) The contract price includes all applicable Federal, State, and local taxes and duties, except as provided in subparagraph (b) (2) (i) of this clause.

(2) Taxes imposed under 26 U.S.C. 5000C may not be—

- (i) Included in the contract price; nor
- (ii) Reimbursed.

* * * * *

4. Amend section 52.229-4 by revising the date of the clause and paragraph (b) to read as follows:

52.229-4 Federal, State, and Local Taxes (State and Local Adjustments).

* * * * *

FEDERAL, STATE, AND LOCAL TAXES (STATE AND LOCAL ADJUSTMENTS)
([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF
PUBLICATION IN THE FEDERAL REGISTER])

* * * * *

(b)(1) Unless otherwise provided in this contract, the contract price includes all applicable Federal, State, and local taxes and duties, except as provided in subparagraph (b)(2)(i) of this clause.

(2) Taxes imposed under 26 U.S.C. 5000C may not be-

- (i) Included in the contract price; nor
- (ii) Reimbursed.

* * * * *

5. Amend section 52.229-6 by-

- a. Revising the date of the clause;
- b. Redesignating paragraph (c) as (c)(1); removing from the newly designated paragraph (c)(1) "States." and adding "States, except as provided in subparagraph (c)(2) of this clause." in its place;
- c. Adding paragraph (c)(2);

d. Redesignating paragraph (d) as (d)(1); removing from the newly designated paragraph (d)(1) "The contract price shall" and adding "Except as provided in subparagraph (d)(2) of this clause, the contract price shall" in its place; and

e. Adding paragraph (d)(2).

The revisions and additions read as follows:

52.229-6 Taxes—Foreign Fixed-Price Contracts.

* * * * *

TAXES—FOREIGN FIXED—PRICE CONTRACTS ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER])

* * * * *

(c)(1) * * *

(2) Taxes imposed under 26 U.S.C. 5000C may not be—

(i) Included in the contract price; nor

(ii) Reimbursed.

(d)(1) * * *

(2) The contract price may not be increased to offset taxes imposed under 26 U.S.C. 5000C.

* * * * *

6. Amend section 52.229-7 by—

a. Revising the date of the clause;

b. Redesignating paragraph (b) as paragraph (b)(1);

and

c. Adding paragraph (b)(2).

The revision and addition read as follows:

52.229-7 Taxes—Foreign Fixed-Price Contracts with Foreign Governments.

* * * * *

TAXES—FOREIGN FIXED—PRICE CONTRACTS WITH FOREIGN GOVERNMENTS ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER])

* * * * *

(b) * * *

(2) Taxes imposed under 26 U.S.C. 5000C may not be included in the contract price.

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[BILLING CODE 6820-EP]

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